COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2014-SC-000015-MR

TOWER INSURANCE COMPANY OF NEW YORK, BRIDGEFIELD CASUALTY INSURANCE COMPANY, INC., AND CONNIE STAFFORD, AS ADMINISTRATRIX OF THE ESTATE OF BRADLEY E. STAFFORD, APPELLANT,

vs.

BRENT HORN, APPELLEE.

On Review From
Court of Appeals of Kentucky
Nos. 2012-CA-001693 and 2012-CA-001835

On appeal from
Martin Circuit Court
Civil Action No. 11-CI-00270

BRIEF OF APPELLEE, BRENT HORN

C.R. 76.12(6) Certificate

I hereby certify that a true and accurate copy of the foregoing was served via FedEx delivery, on the 6th day of February, 2015 upon: Hon. John David Preston, Judge, Martin Circuit Court, 908 Third Street, Suite 217, Paintsville, KY 41240; J. Stan Lee, 333 West Vine Street, Suite 1700, Lexington, KY 40507, Counsel for Tower Insurance Company of New York; A.C. Donahue, P.O. Box 659, Somerset, KY 42502-0659, Counsel for Bridgefield Casualty Insurance Company, Inc.; J. Christopher Bowlin, Osborne & Bowlin, P.O. 479, 412 2nd Street, Paintsville, KY, 41240, Counsel for Mickayla Sesco, as Administratrix of the Estate of Bradley E. Stafford; Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9229; and Ten (10) copies filed via FedEx with Susan Clary, Clerk, Kentucky Court Supreme Court, Room 209, State Capitol, Frankfort, KY 40601-3415. I further certify that the record was not withdrawn by the Appellee.

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STATEMENT CONCERNING ORAL ARGUMENT

Because of the significant and unique questions presented in this appeal Appellee Horn respectfully requests that this Court grant Horn oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

APPENDIX:

Opinion of Martin Circuit Court
Opinion of Kentucky Court of Appeals

COUNTERSTATEMENT OF THE CASE

This case was initially filed by Connie Stafford,[1] as Administratrix of the Estate of Bradley E. Stafford, against Brent Horn ("Horn"), for injuries sustained by and the subsequent death of Bradley E. Stafford in a motor vehicle accident that occurred on September 26, 2011. Bradley E. Stafford, who died that same day from his injuries, fell from a pick-up truck owned by his employer, B&B Contracting, LLC ("B&B"). Record at 2 (Hereafter R. at ___). B&B is in the business of highway mowing, landscaping, and snow removal. R. at 420. At the time of the accident, Horn was operating the vehicle with the permission of B&B. However, Horn was not an employee of B&B. R. at 574.

The vehicle involved in the accident was covered by B&B's policy of liability insurance issued by Tower Insurance Company ("Tower"), identified more specifically as Policy No. CAC 7003646. (Complete policy at R. 45 to 99 and 439 to 495; Tower Brief Appendix Exhibit 1). B&B clearly owned the subject vehicle, listed as a covered auto, and was identified as the named insured on the policy. (R. at 45 and 441; Tower Brief Appendix 1, Bates Pg. 000003[2].) Under that policy, Horn is also included as an insured. The definition of an insured includes:

> Anyone else while using with your permission a covered auto you own, hire or borrow . . . .

R. at 70; (Tower Brief Appendix 1, Pg. 000028)

On or about December 15, 2011, the Martin Circuit Court allowed Tower

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[1] By order of the Court of Appeals dated March 28, 2013, Michalya Sesco was substituted as Administratrix.

[2] All references to page numbers of policy in Tower Appendix are Bates stamp numbers.

to intervene in this matter to seek a declaration of its rights, duties, and obligations. R. at 17. Specifically, Tower sought a declaration that there was no coverage available under its policy for Horn for the claims asserted by Stafford. Tower's position was based on three exclusions set forth in the policy:

> **SECTION II – LIABILITY COVERAGE**
>
> **B. Exclusions**
>
> This insurance does not apply to any of the following:
>
> **3. Workers' Compensation**
> Any obligation for which the "insured" or the "insured's" insurer may be held liable under any workers' compensation, disability benefits or unemployment compensation law or any similar law.
>
> **4. Employee Indemnification and Employer's Liability**
> "Bodily injury" to:
> a. An "employee of the "insured" arising out of and in the course of:
> (1) Employment by the "insured"; or
> (2) Performing the duties related to the conduct of the "insured's" business . . . .
>
> **5. Fellow Employee**
> "Bodily injury" to any fellow "employee" of the "insured" arising out of and in the course of the fellow "employee's" employment or while performing duties related to the conduct of your business.

R. at 21-22. (Tower Brief Appendix 1, Pg. 000029)

The parties took the depositions of Horn and Earlena Duncan, the vice president of B&B, solely on the issues surrounding Horn's employment status with B&B. At the time of the accident, Horn testified that he was a disabled coal miner who had not worked in nearly twenty years. R. at 419-421. In his spare

time, he enjoyed volunteering for his church and assisting other church members in times of need. R. at 427. Earlena Duncan was a fellow church member that he helped out on occasion. R. at 423. In fact, Horn and Duncan are cousins. Horn testified that the two grew up together and attended church together all of their lives. R. at 427. Duncan also testified that she had known Horn all of her life. R. at 430. Horn's son previously worked at B&B, and the two families are members of the "tight knit" Turkey Creek community in Martin County. R. at 426. Duncan similarly testified that she was "best friends" with Horn's sister. Her son and Horn's son are also "best friends." Further, Duncan and Horn's daughter work together at a local insurance agency. R. at 430-431. In short, Horn and Duncan have very close familial and community ties.

On the date of the accident, Duncan contacted Horn to ask if he could help her out at B&B. B&B did not have any licensed drivers available to drive their truck that day, so Horn agreed to do so. R. at 420. As noted above, Horn was simply volunteering to help out a family friend and fellow church member. He had never been paid for assisting Duncan, had no expectation of payment by her or B&B, and was not paid for his assistance on the date of this accident. R. at 420, 422, 426. Rather, he was simply doing a favor for Duncan. R. at 431. Horn was not issued a W-2 for his assistance at B&B, nor was he listed as an employee on B&B's workers' compensation insurance policy. R. at 433, 438. B&B had enlisted the help of other individuals to drive for them when needed on other occasions, but unlike Horn, those individuals were paid for their services. R. at 434, 437.

Horn and Tower both filed motions for declaratory judgment following the depositions of Horn and Duncan. R. at 298, 403. Horn's position was that these depositions conclusively established that Horn was not an "employee" for purposes of workers' compensation, and that the various employee-related exclusions in Tower's policy did not apply to preclude coverage for Horn from the Stafford claim. On the other hand, Tower argued that Horn's employment status was only relevant to the Fellow Employee exclusion, and regardless of whether Horn was an employee of B&B, the other two exclusions still precluded coverage for Horn. On September 13, 2012, the Martin Circuit Court issued its Findings of Fact, Conclusions of Law, Judgment Denying Horn's Motion for Declaratory Judgment, Granting Tower's Motion for Declaratory Judgment and Order declaring the Judgment Final and Appealable. R. at 567. (Horn Brief Appendix 1) In that Order, the trial court addressed the three exclusions which Tower argued precluded coverage for Horn.

First, the trial court found that the Workers' Compensation exclusion was not applicable to preclude coverage for Horn. The Court explained that the purpose of that exclusion was to exclude any matter for which the employer might be liable under workers' compensation law. Because this was a tort case involving a vehicle liability policy, the Court correctly recognized that the exclusion did not apply. R. at 574. (Horn Brief Appendix 1, Pg. 8)

Second, the trial court found that the Fellow Employee exclusion did not apply to Horn. That provision excluded injuries to an employee caused by a fellow employee. Because Horn was not a fellow employee of Stafford, the Court

correctly found that this exclusion did not preclude coverage for Horn. R. at 575. (Horn Brief Appendix 1, Pg. 9)

However, the trial court found that the third exclusion, pertaining to Employee Indemnification and Employer's Liability, did apply to Horn. The trial Court held that this provision excluded any coverage for bodily injury to an employee (Stafford) of the insured arising out of or in the course of his employment with the insured. Because this case was one for tort liability for bodily injury to Stafford, an employee of B&B, whose injuries arose out of his employment with B&B, the Court found that this exclusion precluded coverage for Horn on the Stafford claims against him. R. at 575. (Horn Brief Appendix 1, Pg. 9)

The trial court failed to apply the severability clause contained in Tower's policy issued to B&B. The court found that the purpose of the severability clause was to afford coverage to each named insured, but that it did not take any exclusions away from the policy. In short, the trial court found that the same exclusions would apply to the claims against Horn as would apply against B&B, and that the severability clause did not alter the application of the exclusion for Employee Indemnification and Employer's Liability. R. at 576-577. (Horn Brief Appendix 1, Pg. 10-11)

As noted above, the Martin Circuit Court granted Tower's motion for declaratory judgment, denied Horn's motion for declaratory judgment, and held that Tower was not required to defend or indemnify Horn for the claims made

against him by Stafford.[3]

Horn appealed the Trial court decision to the Court of Appeals. The Court of Appeals in a 2-1 opinion rendered December 13, 2013 reversed the Trial Court and held, *inter alia*, that the severability clause of the Tower policy did require Tower to both defend and indemnify Appellee Horn.

The Court of Appeals said in part:

> Under this policy, B&B is the named insured; Horn is also covered by the policy as *the insured* because he operated the truck with B&B's permission. While both B&B and Horn are insured under the policy, only Horn is claiming the benefit of the coverage as the party against whom the Estate brought its wrongful death claim. Consequently, pursuant to the severability-of-interests clause, the references in the policy to the *insured* refer only to Horn and not to B&B in this case.
>
> Since Stafford was an employee of B&B, the policy's exclusion undoubtedly creates an exception to the duty of Tower Insurance to cover B&B's liability to Stafford's estate. However, if the exclusion is applied in a way that gives meaning to the severability-of-interests clause, the exclusion must be examined independently with respect to the duty of Tower Insurance to cover Horn's liability to the Estate.
>
> By its terms, the employee-exclusion clause applies only where the injured party of an *employee of the insured* **and** the injury arises out of and in the course of the employment. The severability-of-interests clause identifies the entities or persons to whom the phrase *the insured* applies. In this case, the clause limits the term to Horn alone – and Stafford was not Horn's employee. (Court of Appeals Opinion, Horn Brief Appendix 2, pp. 6-7) (Emphasis Supplied)

[3] Because of the substantial difference in the policy limits of B&B's policy and Horn's personal policy, the Martin Circuit Court determined that it would be impractical for Plaintiff to proceed with her case unless and until the coverage issue was disposed of on appeal . As such, the Martin Circuit Court designated its decision as final and appealable pursuant to CR 54.02. R. at 577-578.

ARGUMENT

I. Standard of Review.

As more fully described above, this case was decided by the Martin Circuit Court on cross-motions for summary judgment. The relevant and material facts were undisputed by the parties. The sole issue determined by the Martin Circuit Court was a legal one—specifically, whether Horn was entitled to coverage under the Tower policy issued to B&B as an omnibus insured.

The standard of review on appeal of summary judgment is whether the trial court correctly found that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56.03; *Norton Hospitals, Inc. v. Peyton*, 381 S.W.3d 286, 290 (Ky. 2012). Additionally, there is no requirement that this Court defer to the trial court's assessment of the record or its legal conclusions, since factual findings are not in issue. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996); *Spencer v. Estate of Spencer*, 313 S.W.3d 534, 537 (Ky. 2010). Rather, the decisions of the Trial Court and the Court of Appeals should be reviewed *de novo*. *Canter v. Smith,* 366 SW 3d 414, 419 (Ky. 2012); *Giddings & Lewis, Inc. v. Industrial Risk Insurance*, 348 SW 3d 729 (Ky. 2011).

II. The Tower Insurance Policy Provides Coverage for Appellee Horn for the Claims of The Estate of Stafford Against Him.

The reliance of Tower Insurance Company on *Brown v. Indiana Insurance Company*. 184 SW 3d 528 (Ky. 2005) is misplaced and does not provide a basis for finding the Tower policy does not provide Horn coverage. It is clear in *Brown* that the individuals killed were, without question, employees of Indiana's insured when they were killed. In addition, in Brown the defendants were a fellow

employee and the employer of both the deceased employees as well as the defendant fellow employee. There was also no question that the employees were in the scope and course of their employment. Brown at 530. The *Brown* Court in upholding the employee indemnification and employer liability exclusion began with the principle premise that the individuals involved were employees of Indiana Insurance Company's insured. Here, there is no doubt that Horn was not an employee of B&B and thus, not a fellow employee of Stafford, nor was Horn an employer of Stafford. Here, there was no fellow employee as was true in *Brown*, nor was there any employment relationship between Horn and Stafford. Thus, the reliance by Tower on the fellow employee and worker's compensation exclusions are inapplicable. Here, B&B was protected from the claim of the Stafford Estate since B&B was Stafford's employer and the worker's compensation bar prohibits any claim against B&B by Stafford.

While Tower discounts the fact that in *Brown* "The permissive driver... was also an employee of the named insured...". (Tower Brief, Pg. 7), that distinction is a major reason *Brown* does not apply here. The *Brown* Court said:

> "A worker's compensation exclusion in a policy of commercial automobile or CGL Insurance, such as Exclusion 3 in this Indiana Insurance policy, precludes coverage when the insured employer is exposed to tort liability solely because of its failure to procure a policy of worker's compensation insurance... The worker's compensation clause precludes coverage for liability derived from an obligation which should have been handled as a worker's compensation claim...." (Emphasis supplied)

Brown at 535.

Here, however, coverage for Horn under the Tower policy is mandated as there can be no worker's compensation bar for Horn from the Stafford Estate,

since there was no employment relationship. This difference is clearly material and distinguishes *Brown* from the case here.

Further, Tower cannot, as Indiana did in *Brown,* rely on the "fellow employee" exclusion in its policy. In *Brown* there was no issue regarding the fact that the deceased were fellow employees of the Defendant Akers and:

> "Although KRS 342.690(2) punishes Willowbank for its failure to provide worker's compensation insurance by denying it the right to assert the 'common law fellow servant' defense in this tort action, it does not purport to punish Indiana Insurance, an innocent party, by denying it the right to assert the 'fellow employee' exclusion it its tort liability policy…"

Brown at 536.

Here (1) there was no 'fellow employee' relationship between Horn and Stafford and (2) B&B had provided worker's compensation coverage for Stafford's claim against B&B. Both of these facts distinguish Brown and require coverage for Horn.

Finally, Tower's reliance on *Brown* for Exclusion 4, "employee," is misplaced. This exclusion is not applicable here because (1) Horn is an insured but Stafford was not his employee (see Argument 3, Infra); (2) Stafford's claim against B&B is precluded by the worker's compensation bar; and (3) Brown said … "Exclusion 4" … "applies to any injury to any employee of the insured …." *Brown* at 535. (Emphasis supplied) The named insured in the Tower policy is B&B Contracting, LLC, not Horn, thus the employee exclusion is a bar to a claim against B&B if worker's compensation was not already in place but cannot be asserted by Tower against Horn since Stafford was not Horn's employee.

Likewise, Tower's claim that *Northland v. Zurich,* 743 N.W.2d 145 (S.D. 2007) is dispositive of Horn's claim is disputed by Horn. As noted by the *Northland* Court, the Wisconsin case, that it based *Northland* and its predecessors on, *Bernard v. Wisconsin Automobile Insurance Company*, 210 Wis. App. 133, 245 N.W. 200 (1932) was abandoned by the Wisconsin Court in *Gulmire vs. St. Paul Fire and Marine Insurance Company*, 269 Wis 2d 501, 674 N.W.2d 629 (Wis. App. 2003).

Indeed, the *Gulmire* Court held that where:

> ... St. Paul argues that even though Klister is a protected person, various exclusions – the fellow employee exclusion, the employer liability exclusion and the worker's compensation exclusion – bar coverage. Gulmire claims the exclusions do not apply after application of the 'separation of protected persons' provision. Because of this provision, Gulmire argues Klister becomes a separate and distinct insured under his own policy; thus, the various exclusions will not apply. We agree... (674 N.W.2d at 636)
>
> The separation clause takes effect after an individual has been declared a protected person. In other words, the separation clause does not create or extend coverage to a protected person. That is the function of the 'who is protected under this agreement' section. Instead, the separation provision only concerns how the particular protected person is to be treated throughout the policy....
>
> The separation provision applies the policy to each named insured as if that insured was the only named insured. That is, if all three of the named insureds sought coverage, the separation provision would literally sever the agreement into three distinct policies. One for Sheriff, another for Fox Valley Wholesale, and the final to Fox Valley Auction. The limits of coverage, though, would not be multiplied by the severance.... (674 N.W.2d at 637)
>
> It is undisputed that Gulmire was a fellow employee of Klister and that her injuries arose out of and occurred in the course of her employment. If that were all the exclusion called for, we would agree with the trial Court and St. Paul that the exclusion bars coverage. However, the exclusion demands more. It requires

Gulmire's injuries to arise out of and occur in the course of her employment 'by you'. These modifying words are what create difficulty. After applying the separation provision, it is apparent that the exclusion cannot be applied, for it now reads:

We won't cover bodily injury to a fellow employee [Gulmire] of any protected person [Klister] arising out of and in the course of the fellow employee's [Gulmire's] employment by you [Klister].

Gulmeyre was employed by Fox Valley Auto Auction not by Klister, thus, the exclusion does not bar coverage...

St. Paul next advances the employer's liability exclusion. This exclusion provides:

We won't cover bodily injury to an employee arising out of his or her employment by a protected person.

Applying the separation provision, the exclusion now reads:

We won't cover bodily injury to an employee [Gulmire] arising out of his or her employment by a protected person [Klister].

Again, Klister did not employ Gulmire. Therefore, the exclusion is inapplicable.

Finally, St. Paul offers the worker's compensation exclusion. The exclusion states:

We won't cover any obligation that the protected person has under worker's compensation.

In light of the separation provision, the exclusion now states:

We won't cover any obligation that the protected person [Klister] has under a worker's compensation law.

This exclusion does not apply. Klister, as a non-employer, does not have any obligation under worker's compensation.... (674 N.W.2d at 638)

The South Dakota Supreme Court recognized this problem in *St. Paul and Marine Insurance Company v. Shilling*, 520 N.W.2d 884 (S.D. 1994). There, the Court held it would not support an interpretation of the same separation provision at issue in this case that created separate insurance policies for all protected persons.

> The Court's conclusion rested on the premise that a permittee user, that is, an additional insured, cannot have more coverage under the policy than the named insurance.
>
> In Wisconsin, however, we have allowed for this result. See *United States Fidelity and Guarantee Company v. PBC Productions*, 153 Wis. 2d 638, 451 N.W.2d 778 (Ct. App. 1989)... (674 N.W.2d at 639)
>
> USF&G stands for the proposition that an additional insured may receive greater coverage under a policy than the named insured. If Wittliff sued PBC, his employer and the named insured, for the accident, the exclusion clearly would have barred coverage. However, Witliff sued USF&G for Larson's negligence. We, nevertheless, construed 'the insured' language in the exclusion to mean Larson, the co-employee and additional insured, and not PBC, the employer and named insured. The effect of this construction was to grant greater coverage to an additional insured than would have been afforded to the named insured. In view of USF&G, construing the separation provision in the case at hand in the manner that allows an additional insured to receive greater coverage does not produce an absurd result ...
>
> The separation provision [here] treats Klister individually, as if he was the only named insured; therefore, none of the exclusions bars coverage ... (674 N.W.2d at 640)

The facts in *Gulmire* are virtually identical to those here. The reasoning of the *Gulmire* Court is consistent with the language in the insurance policy there. Likewise, here, the facts of the Horn matter fit the identical interpretation of the insurance exclusions here. They simply do not apply and coverage should be extended.

Other Courts have also considered these issues. These jurisdictions have explicitly rejected arguments such as those advanced by Tower that coverage should not be afforded to an omnibus insured when coverage is excluded as to the named insured. This Court should follow the well-reasoned decisions of these jurisdictions and uphold the Court of Appeals.

In the 1989 decision by the Supreme Court of Alabama in *Wilson v. State Farm Mut. Auto. Ins. Co.*, 540 So.2d 749 (Ala. 1989), State Farm, which insured a fleet of vehicles owned by the Marshall County Board of Education contended in a lawsuit brought by an employee of the Board against the Board and four individuals that it did not have coverage. State Farm argued that the Plaintiff's decedent was an employee of the Board. However, the Alabama Court pointed out that he was not an employee of the employee-supervisors who were also insureds under the policy. *Id.* at 751. In discussing its prior decision in *United States Fire Ins. Co. v. McCormick*, 243 So.2d 367 (Ala. 1970), the Alabama Court said:

> In *United States Fire Ins. Co.*, as here, an individual employee of the named insured was also an insured who was sued by two other employees of the named insured. There, as here, the insurance company argued that it was under no duty to defend or afford coverage to the individual insured defendant because, it argued, the employee exclusion applied where the plaintiffs were employees of the named insured (a corporation), although they were not employees of the individual defendant. In that case, the insurance company advanced the same argument that State Farm makes here: that an exclusion as to claims of injury made by an employee of the named insured operates to exclude a claim made against an *additional* insured claiming coverage under the policy if the injured party is an employee of *any* insured under the policy. The Court rejected that argument and said:
>
> "The term 'insured' as used in coverages A and B of Policy No. CAG 18 09 67 *is defined by the insurer* to include any executive officer, director or stockholder of the corporation while acting within the line and scope of his duties as such. It is undisputed that McCormick, Baird and Bodiford were, on June 26, 1962, the president, vice-president and sewer foreman, respectively, of Mac's [one of two named insureds]. ...
>
> The Court rejected the insurance company's reliance on

Michigan Mutual in the following language:

> "We think we have demonstrated that McCormick, as a named insured, and Baird and Bodiford, as additional insureds, are entitled to defense and coverage under the policy, unless barred by exclusion (h), which we now proceed to discuss.
>
> "Appellant argues in brief that where a public liability policy contains an exclusion as to claims for injury made by an employee of the insured, such exclusion applies as to claims made against an additional insured claiming coverage under the policy if the injured party is an employee of any person insured under such policy; and, further, that where a public liability policy contains an exclusion as to any claim for which the insured or his insurer may be held liable under workmen's compensation, such exclusion operates to exclude an additional insured as well as the named insured from coverage under the policy as to liability for injuries to an employee of the named insured.'...
>
> "In the *Michigan Mutual* case, supra, we refused to adopt appellant's contention that the phrase, 'employee of the insured,' should be construed to mean the 'employee of the insured against whom suit is being brought,' citing a number of cases in support of our position. ...

Id. at 752.

The Court concluded that because of the possibility of several insureds, there was an ambiguity and said:

> We do not think that the decision in *United States Fire Ins. Co.* turned on the fact that the policy contained a severability of interests clause that said, "The term 'the insured' is used severally and not collectively...." The addition of this clause does not eliminate the ambiguity that exists in the exclusion where there are multiple insureds and the injured party is an employee of one or some, but not all. The ambiguity in the exclusion remains, whether or not the policy contains this clause. ...

Id.

Here, there is no issue as to the fact that Stafford was not an employee of

Horn. Providing further support for Horn's position is *Farmers Ins. Group v. Home Indemnity Co.*, 108 Ariz. 126, 493 P.2d 909 (Ariz. 1972), where the Supreme Court of Arizona, in upholding Farmers' position that Home Indemnity's policy should apply, said:

> Farmers Insurance relies on the omnibus clause of the Home Indemnity policy extending coverage to anyone using the truck with permission of the insured, arguing that since Daly was loading the truck, he was using it with permission of Rite-Way when Espinoza was killed; therefore, Daly was insured under the Home Indemnity policy. Farmers Insurance concludes that the exclusion in section II(c) does not apply to Daly because Espinoza was an employee of Rite-Way, and Daly was not 'the insured.'
>
> Both parties recognize that Daly is 'an' insured. But Home Indemnity takes the position that both Daly and Rite-Way are 'the insured,' hence, irrespective of Espinoza's relation to Daly, he was still an employee of Rite-Way and the exclusion is applicable to prevent a recovery against it even though a recovery is had against Daly. The controversy, therefore, centers around the meaning of the words 'the insured' as used in the exclusion clause. The question to be settled is what effect must be given to the Home Indemnity policy excluding employees of the owner where Daly, who was not the insured owner, did not employ Espinoza but committed the negligent act. ...
>
> It is our conclusion that the exclusion is not applicable to the permissive user, Daly, although it may be given force and effect in a suit by Espinoza or his personal representative against Rite-Way. ... (Espinoza's employer.)

Id. at 911.

Similarly, the California Court of Appeals has succinctly stated that:

> The exclusion must be read as a whole and we think leads inescapably to the conclusion that it means only that the coverage, whether of the named insured or the additional insured, does not apply to anyone who has liability under the workmen's compensation laws. As Pleasant Valley and Croker are additional insureds under defendant's policy, and

> as there is nothing in the record to show that either Croker or Pleasant Valley is obligated to Nungaray under workmen's compensation law, with respect to the accident, it is clear that Pleasant Valley and Croker are not excluded from policy protection as to an action brought by Nungaray against them for personal injuries.

Pleasant Valley Lima Bean Growers and Warehouse Ass'n v. Cal-Farm Ins. Co., 298 P.2d 109, 114 (Cal.App. 1956).

North Carolina is also in accord with this result. In *Penske Truck Leasing Co. v. Republic Western Ins. Co.*, 407 F.Supp.2d 741, 751 (E.D.N.C. 2006), the Court recognized that:

> [W]here the clause bars coverage for bodily injury to "the" insured, and the policy specifically designates the "insured" as the insured who is seeking coverage, it would not be logical to bar coverage where an additional insured such as Penske is being sued by an individual who may be an employee of the named insured but who is, vis-à-vis Penske, merely a member of the general public.

See also Ryder Truck Rental, Inc. v. St. Paul Fire & Marine Ins. Co., 540 F.Supp. 66 (N.D.Ga. 1982); *Employers Mut. Liability Ins. Co. of Wisconsin v. Farm Bureau Mut. Ins. Co. of Arkansas*, 549 S.W.2d 267 (Ark. 1977).

In this case, it is unquestioned that Horn could never be liable to Stafford for Workers' Compensation, since he was not Stafford's employer. Rather, Stafford's employer was B&B Contracting, LLC. Horn was simply a permissive driver and thus, an insured under the omnibus provisions of the Tower policy. As such, the Employee Indemnification and Employer's Liability exclusion does not apply to Horn and cannot preclude coverage for him. Therefore, the decision of the Court of Appeals should be upheld.

III. The Court of Appeals was Correct in Holding the Severability Clause Requires Tower to Defend and Indemnify Horn.

In addition to the foregoing, Tower argues that the decision of the Kentucky Court in *Liberty Mutual Insurance v. State Farm Bureau Auto Insurance Company*, 522 S.W.2d 184 (Ky. App. 1975) upholds its position that Horn, as an additional insured, is subject to the same exclusions as B & B set forth in the Tower policy. The Court of Appeals disagreed. The Court of Appeals stated:

> Finally, Tower Insurance contends that it is unreasonable to afford greater coverage to Horn, the additional insured, who paid no premium for the policy, than to the named insured B&B, which did pay for the policy. Citing *Liberty Mutual Insurance Company v. State Farm Mutual Auto Insurance Company*, 522 S.W.2d 184, 186, (Ky. 1975), Tower Insurance argues that we are bound to apply the employee exclusion clause against Horn since the purpose of a severability-of-interest clause is to guarantee the same coverage to all the insureds and not to 'take exclusions out of the policy' (citation omitted).
>
> In *Liberty Mutual*, the Court considered whether a household exclusion contained in an automobile liability insurance policy applied to an additional insured under the omnibus clause of the policy (footnote omitted). In that case Rebecca Payne, the daughter of State Farm's insured, J.E. Payne, was injured while a passenger in her father's vehicle. At the time of the accident the vehicle was being driven by Rebecca's brother, John D. Payne, who was an agent of Bardstown Road Presbyterian Church. The church was an additional insured under the omnibus clause of State Farm's policy. Rebecca filed an action against her brother and Bardstown Road Presbyterian Church.
>
> The Trial Court decided that State Farm's policy exclusion applied to the church since the purpose of the household exclusion was to protect the insurer from collusive 'overly friendly civil actions'. In affirming on appeal, the Appellate Court concluded that:
>
> 'Even though the injured party may not be a relative and member of the household of an additional insured, whose liability is derivative, there still is the relationship existing between the

> insured operator of the automobile and the injured party, with the likely result of an overly friendly lawsuit'.
>
> The Court held that the purpose of the exclusion would be defeated if the additional insured were afforded coverage under the circumstances.
>
> The rationale underlying the Court's holding on this point is irrelevant to the circumstances under our consideration, and Tower Insurance does not argue otherwise. Instead, Tower Insurance relies on *obiter dictum* included in the Court's opinion, indicating that it is not reasonable to afford greater coverage to an additional insured who has paid no premium for coverage than to the named insured. We are not bound by the Court's observation since it was not central to the case. (citation omitted) Moreover, the Court expressly declined to consider the effect of the severability-of-interest clause upon the coverage exclusion since the clause applied only where two or more insureds have been named in the declarations and not the situations involving an additional insured. It was only in the case of two or more named insureds, the Court concluded, that the clause was meant to guarantee the same protection to each of them.
>
> Even if the Court's reasoning in *Liberty Mutual* were applicable under the facts and circumstances of this case, its conclusion would render the severability-of-interest clause meaningless. The clause included in Tower Insurance's liability policy explicitly directs that the policy be applied 'separately to each insured who is seeking coverage....' The highly unique facts of this case dictate that Horn is deemed to be an insured because of his permissive use of B&B's vehicle. Because Stafford was not Horn's employee, Horn enjoys a unique status and is not barred from coverage, either for purposes of defense or indemnification. The omnibus exclusion clause drafted by Tower Insurance does not extend to exclude Horn in the circumstances.

Court of Appeals Opinion pp. 10-12 (Horn Brief Appendix 2)

Further, Tower misses the point that B&B is clearly covered by the policy and is entitled to the exclusions as it relates to claims by Stafford's estate against B&B. B&B is still protected from the fellow employee's suit and is entitled to the worker's compensation bar of any potential tort claim by Stafford's estate. Under

the Tower reasoning Horn would simply be left "holding the bag." Horn, after all, was assisting as a volunteer for B&B, was operating B&B's vehicle, was clearly an insured under the severability clause and there was clearly a claim made against Horn by a non-employee of Horn's. This was a separate claim against Horn and under the clear language of the severability clause, Horn is entitled to the defense and indemnity of the Tower policy.

In a decision on facts similar to those here the court in *Centennial Insurance Company v. Ryder Truck Rental, Inc.*, 149 F.3d 378 (5th Cir. 1998), concluded that under similar circumstances, the exclusions would not apply to exclude coverage to an additional insured. In *Centennial* the Court said:

> ...Ryder considers the worker's compensation and employee injury exclusions only when the insured claiming coverage is sued by one of its employees. Centennial counters that the separation of Insured's provision in no way precludes the worker's compensation and employee injury exclusions from controlling win, as in this case, an employee sues another insured for injuries....

Id. at 383.

The Court concluded that:

> "We agree with Ryder. Declining to read the severability-of-interest clause as limiting the Stubbs policy exclusions to 'any employee of the insured against whom a claim is made or sued is brought' or 'any employee of the insured of whom liability is sought to be imposed' manifests a refusal to inject either the phrase 'against whom a claim is made or suit is brought' or the phrase 'against whom liability is sought to be imposed' into the Stubbs' policy thereby makes the suggestion that Stubbs and Canal could have restricted the applicability of the Stubbs policy exclusions had they included the phrase 'against whom a claim is made or suit is brought' or the phrase 'against whom liability is sought to be imposed' in the severability-of-interest clause....

Id. at 385.

The Court went on to state:

> The preponderance of pertinent cases favors Ryder's construction of the Scholastic policy. A majority of Courts asked to determine the effect of an automobile insurance policy's severability-of-interest clause worded like the separation of insured's provision (i.e. a severability-of-interest clause containing the phrase 'against whom a claim or suit is brought' or very similar language) on policy exclusions relating to worker's compensation and employee injury like those in the Scholastic policies have, for various reasons, construed the clause to limit the exclusion to instances where the insured claiming coverage is being sued by its employee.... (Emphasis Added)

Id. at 386.

Under the *Centennial* reasoning Horn is clearly entitled to coverage.

The Court of Appeals here agreed:

> "A majority of Courts have rejected this analysis. Instead, most Courts addressing the effect of automobile insurance policies severability-of-interest clause (worded like the one under consideration in this case) have construed the clause to limit the employee exclusion only to situations where the insured claiming coverage is being sued by his employee." (Court of Appeals Opinion Horn Brief Appendix 2, pp. 9-10.)

Horn is clearly entitled to defense and indemnification under the Tower policy. The severability clause of the Tower policy affords coverage under the policy because it "applies separately to each insured who is seeking coverage or against whom a claim or 'suit' is brought". (R. at 78 and 474, ¶G); (Tower Brief Appendix 1 p. 000036) Because of this, Horn is entitled to separate coverage.

In its reliance on *National Insurance Underwriters v. Lexington Flying Club, Inc.*, 603 S.W.2d 490 (Ky. App. 1980), Tower fails to recognize the distinctions that were made in a later decision by the Court of Appeals in *K.M.R.*

v. Foremost Insurance Group, 171 S.W.3d 751 (Ky. App. 2005). In *Foremost* the Court discussed a Wisconsin case, *Northwestern National Insurance v. Nemetz,* 135 Wis. 2d 245, 400 N.W.2d 33 (Wis. App., 1986) and its severability language. The Kentucky Court pointed out that:

> The language employed in the policies of the *Nemetz* case differs significantly from that used in exclusions in the case before us. In *Nemetz*, the policy exclusions absolve the insurer from liability for damages 'expected or intended by an insured' and damages 'intended or expected by the insured.' (citation omitted) In contrast to a generalized approach, the intentional acts exclusion in the Foremost policy, addresses the insured more precisely and more directly, excluding coverage for damages that are 'intended by any of you to cause any harm or that any of you could reasonably expect to cause harm....
>
> This language unambiguously denies coverage for all liability incurred by each and any insured as a result of certain conduct by any of the persons insured by the policy.... We noted in Nemetz that by using the terms 'an insured' and 'the insured' in their exclusionary provisions, the insurers failed to adequately draft the policy to exclude coverage for both insureds based on the excludible acts by one insured. Thus, we held that the exclusionary clauses precluded coverage for the insured who committed the excludable acts, but not for the innocent insured....

171 S.W.3d at 754 – 55.

> The Tower severability provision provides:
>
> 'Insured' means any person or organization qualifying as an insured in the 'who is an insured provision' of the applicable coverage. Except with respect to the limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom against a claim or suit is brought.

Tower Brief Appendix 1 p. 000036.

The exclusion contained in the Tower policy states that insurance would not apply to any of the following:

...

Bodily injury to:

A. An employee of the "insured" arising out of and in the course of:
(1) Employment by the insured; ...

Tower Brief Appendix 1 p. 000029.

Notably, the distinction references "the insured" compared to the severability provision which references "an insured". This clearly distinguishes *Lexington Flying Club* and is consistent with the adoption by the *Foremost Insurance* Court of the Wisconsin *Nemetz* decision. Again, Horn is entitled to coverage as a separate insured.

The purpose of a severability clause is "to provide each insured with separate coverage, as if each were separately insured with a distinct policy, subject to the liability limits of the policy." *Bituminous Cas. Corp. v. Aetna Life and Cas. Co.*, 599 S.W.2d 516, 520 (Mo.App. 1980). With respect to exclusions, these clauses generally operate to limit the meaning of the term "insured" to the party actually seeking coverage. *Lumberman's Mut. Cas. Co. v. Hanover Ins. Co.*, 645 N.E.2d 35, 38 (Mass.App. 1995). However, as the Court of Appeals impliedly held, the Martin Circuit Court erroneously treated Horn and B&B as one in the same in applying the Employee Indemnification and Employer's Liability exclusion to Horn.

Notably, the addition of the severability clause to insurance policies was brought about by the insurance industry itself in response to court interpretations which conflicted with the insurers' own intentions about their policies:

> National representatives of insurance trade associations consistently interpreted the word 'insured' in the employee exclusion clause without the severability of interests clause. In situations like the one in the present case 'insured' meant the particular person who claimed coverage. It simply operated to deny coverage of loss to an employee of the claimant. Some courts, however, decided otherwise. In 1955 the national representatives recommended that insurers add the severability of interests clause to clarify the matter.

Liberty Mut. Ins. Co. v. Iowa Nat. Mut. Ins. Co., 186 Neb. 115, 181 N.W.2d 247, 249 (Neb. 1970). *See also, Shelby Mut. Ins. Co. v. Schuitema*, 183 So.2d. 571, 573 (Fla.App. 1966) ("We find ourselves unable to adopt a conclusion that the policy affords less coverage than that which the industry generally intended to provide."); *Shelter Mut. Ins. Co. v. Brooks,* 693 S.W.2d 810, 812 (Mo. 1985) ("[T]he intention behind the severability of interest clause was to limit the scope of exclusion to the insured claiming coverage.").

Application of the severability clause works to preserve "the plainly intended effect of protecting an insured employer from being sued by its own employee for damages from personal injuries suffered during the course of employment, the employee thereby being entitled to workers' compensation." *Lumberman's Mut. Cas. Co.*, 645 N.E.2d at 39. *See also, Schuitema*, 183 So.2d at 574 ("The exclusion as to employees of the insured is thus limited and confined to the employees of the employer against whom the claim is asserted."); *Bituminous Cas. Corp.*, 599 S.W.2d at 520 ("We conclude that the employee exclusion is

limited in its operation by the severability clause to cases in which an injured employee seeks to impose liability upon his insured employer."); *See also*, *Cook v. Country Mut. Ins. Co.*, 466 N.E.2d 587 (Ill. App. 1984).

The severability clause either provides coverage to Horn or else it becomes purely illusory. It should not be rendered meaningless or ignored. See, *Roberts v. Huddleston*, 82 S.W.2d 469 (Ky. 1935). *See also, Commercial Standard Ins. Co. v. American General Ins. Co.*, 455 S.W.2d 714, 721 (Tex. 1970) ("We must assume that the 'Severability of Interests' provision was added to the standard policy for some purpose."); *Schuitema*, 183 So.2d at 574 ("This result gives full effect to the severability of interests clause which provides that the term 'the insured' is used severally."). If no coverage is afforded to Horn, then the clause is meaningless or, at best, ambiguous and must be construed against Tower. *See, Simon v. Continental Ins. Co.*, 724 S.W.2d 210 (Ky. 1986). Certainly Horn had a reasonable expectation that B&B's insurance would cover him while operating the B&B vehicle. *See, Woodson v. Manhattan Life Ins. Co. of New York*, 743 S.W.2d 835 (Ky. 1987).

When the Employee Indemnification and Employer's Liability exclusion is read in light of the severability clause, it demonstrates that coverage is afforded to Horn for the claims asserted by Stafford. At a minimum, it creates an ambiguity, as the exclusion could arguably refer to any insured or only the insured claiming coverage. Since ambiguities must be resolved in favor of the insured, this Court should hold that the exclusion would not preclude coverage for Horn, and affirm the Court of Appeals below.

IV. The Tower Exclusions are in derogation of the Kentucky Motor Vehicle Reparations Act.

Even though the Court of Appeals did not address the issue, Tower continues to argue that its exclusions are not in derogation of the Kentucky Motor Vehicle Reparations Act. (Tower Brief, pp. 15-19)

While insurers have the right to impose "reasonable limitations" on their coverages, these limitations or exclusions may not violate public policy. *Lewis v. West American Ins. Co.*, 927 S.W.2d 829, 834 (Ky. 1996). The Kentucky Motor Vehicle Reparations Act ("MVRA") was adopted by the Kentucky General Assembly to protect "the interests of victims, the public, policyholders, and others." KRS 304.39-010. The General Assembly also set forth specific purposes for the MVRA, including:

> (1) To require owners, registrants and operators of motor vehicles in the Commonwealth to procure insurance covering basic reparation benefits and legal liability arising out of ownership, operation or use of such motor vehicles;
>
> (2) To provide prompt payment to victims of motor vehicle accidents without regard to whose negligence caused the accident in order to eliminate the inequities which fault-determination has created;
>
> ...
>
> (5) To reduce the need to resort to bargaining and litigation through a system which can pay victims of motor vehicle accidents without the delay, expense, aggravation, inconvenience, inequities and uncertainties of the liability system ...

See 304.39-010. See also, Mitchell v. Allstate Ins. Co., 244 S.W.3d 59 (Ky. 2008).

Tower's construction of its policy to deny coverage to Horn runs afoul of the important public policy set forth in the MVRA and should be denied by this Court. The Kentucky courts, have made it clear that among its chief purposes, the MVRA was enacted to broaden rather than narrow or eliminate coverage. In *Miller v. U.S. Fidelity & Guaranty Co.*, 909 S.W.2d 339, 343 (Ky. App. 1995), the Court explained that:

> In enacting the MVRA, the legislature clearly struck a balance, taking into account the needs and expectations of both the insured and the obligor. *See,* KRS 304.39-010. As the Kentucky Supreme Court has noted, "[t]he primary purpose of the MVRA is to benefit motor vehicle accident victims by reforming, and in some areas broadening, their ability to make and collect claims." (*citing Crenshaw v. Weinberg*, 805 S.W.2d 129 (Ky. 1991)).

The specific requirements and public policy goals set forth in the MVRA "supersede general principles of insurance law as broadly applied." *National Ins. Ass'n v. Peach*, 926 S.W.2d 859, 860 (Ky.App. 1996). Further, the MVRA is remedial legislation which "must be broadly construed to effectuate its purpose." *Coleman v. Bee Line Courier Service, Inc.*, 284 S.W.3d 123, 130 (Ky. 2009).

Tower's construction of its policy frustrates rather than furthers these goals and therefore requires this Court to affirmatively find if, on no other basis, that the Tower policy exclusions cannot be read to exclude coverage for Horn. The MVRA requires B&B to provide insurance coverage arising out of the use of its motor vehicle by anyone operating the vehicle with its permission. However, Tower's interpretation and the application of the employee indemnification and the employers liability exclusion coverage would deny coverage to Horn, a permissive driver, in the very same scenario in which the MVRA mandates that

coverage be provided. Therefore, if the Tower exclusions are permitted to deny coverage to Horn it likewise, denies the claims of injured persons, such as Stafford. This is exactly what the MVRA was enacted to prevent. *See also, Peach*, 926 S.W.2d at 860 ("Our courts have explained that the MVRA is social legislation that must be liberally construed to accomplish those objectives.").

Further, the Kentucky Supreme Court has recognized that "[t]he MVRA does not gamble that a permissive driver *may* have insurance." *Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co.*, 326 S.W.3d 803, 811 (Ky. 2010). Rather, KRS 304.39-080(5) requires every owner of a motor vehicle registered or operated in the Commonwealth to provide continuously a contract of insurance or other security for payment of any tort liability arising from the use of the vehicle. Moreover, KRS 304.39-100(1) provides that "[a]n insurance contract which purports to provide coverage for basic reparation benefits or is sold with representation that it provides security covering a motor vehicle has the legal effect of including all coverages required by this subtitle."

Additionally, exclusionary clauses such as those relied upon by Tower to deny coverage to Horn cannot be used to provide coverage less than that mandated by the MVRA. In *Bishop v. Allstate Ins. Co.*, 623 S.W.2d 865, 866 (Ky. 1981), the Kentucky Supreme Court explained that:

> An exclusionary clause in an insurance contract which reduces below minimum or eliminates either of these coverages effectively renders a driver uninsured to the extent of the reduction or elimination. Because the stated purpose of the MVRA is to assure that a driver be insured to a minimum level, such an exclusion provision contravenes the purpose and policy of the compulsory insurance act.

See also, Beacon Ins. Co. of America v. State Farm Mut. Ins. Co., 795 S.W.2d 62 (Ky. 1990).

It is undisputed that B&B was the owner of a motor vehicle within the MVRA. As such, pursuant to KRS 304.39-080(5), B&B was obligated to obtain insurance coverage for tort liabilities arising from the use of its motor vehicle. The MVRA requires B&B to provide insurance coverage arising out of the use of its motor vehicle by anyone operating the vehicle with its permission.

Other jurisdictions have similarly held that the exclusion for bodily injury to an employee of the insured ran afoul of the jurisdiction's financial responsibility laws. In *Farmers Ins. Group v. Home Indemnity Co.*, 108 Ariz. 126, 493 P.2d 909, 912 (Ariz. 1972), the Arizona Supreme Court explained how this exclusion as applied to a permissive user would violate the public policy behind that state's financial responsibility laws:

> In the present case, we think that public policy would be thwarted by holding that the exclusion will be applied where a person is injured by a third party insured by the owner because he is an employee of the owner. Obviously, the purpose of the exclusion is to protect the owner from the expense of double coverage where its employee is covered by workmen's compensation. But to apply the exclusion without limitation to defeat coverage of third parties [Horn] frustrates the purposes of the Financial Responsibility Act.
>
> The target of automobile insurance is to effect indemnity against loss and, therefore, a policy should be construed in such a way that this purpose will be effectuated rather than in a way which will defeat it, and consequently, it should be interpreted most strongly against the insurance company.

See also, Granite State Ins. Co. v. Transamerica Ins. Co., 713 P.2d 312 (Ariz.App. 1985); *Makris v. State Farm Mut. Auto. Ins. Co.*, 267 So.2d 105, 108-109 (Fla.App. 1972).

This exclusion has also been declared invalid under Montana's Financial Responsibility Law. In *Fire Ins. Exchange v. Tibi*, 51 F.Supp.2d 1076, 1079 (D.Mont. 1996), the Court said:

> An examination of the portion of the 'employee' exclusion relied upon by Allstate, in this case, reveals that it effectively operates to deprive those persons described in the exclusion of all liability coverage, including the minimum coverage... Consequently, it is necessarily invalid and unenforceable...

In short, the interpretation of the Employee Indemnification and Employer's Liability exclusion as urged by Tower would operate to deny coverage in contravention of the stated goals and purposes of the MVRA.

Finally, Tower again relies on *Brown, supra.* As we have shown above, both *Brown* and *Liberty Mutual Insurance Company, supra,* are not applicable here. Tower states that Horn was not "left without insurance coverage" because "he is covered under his own policy of automobile insurance." (Tower Brief at pp. 17-18.) That, however, ignores the fact the Horn was operating the B&B vehicle and had a reasonable expectation that insurance covering a B&B vehicle would cover him while he was operating the B&B vehicle. Here, Horn was doing a favor for a family friend by operating a vehicle owned by B&B. He had no expectation of payment, nor did he wish to have any payment. What he did have, however, is a reasonable expectation that when operating the vehicle of B&B, any "... coverage afforded applies separately to each insured who is

seeking coverage or against whom a claim or suit is brought." (See severability clause Tower Brief Appendix 1 p. 36)

Simply put, to deny Horn coverage under the Tower policy is, in fact, in derogation of the MVRA.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be upheld by this Court.

Respectfully submitted,

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